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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES WAYNE BAKER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 41A01-0701-CR-12

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable K. Mark Loyd, Judge
Cause No. 41C01-0505-FC-23

November 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Charles W. Baker (“Baker”) appeals his sentencing, following his conviction, pursuant to guilty plea, for operating a motor vehicle while intoxicated causing death, as a class C felony.

We remand for resentencing.

ISSUES

Baker raises three issues on appeal; however, we restate the issues for proper review at this time as follows:

1. Whether Baker’s sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004).
2. Whether Baker’s seven-year sentence is appropriate.

FACTS

On the evening of February 11, 2005, Baker drank alcohol and played cards and video games with his friends, Ross Hoover, Ian Marks, Daniel McClain, and Keith Wilson at Marks’ Greenwood home. During the course of the evening, Marks warned his friends not to drive his black Honda because it was uninsured. The men drank alcohol until approximately 7:00 a.m. the following morning. Baker then drove McClain and Hoover to a White Castle restaurant in Marks’ Honda. Baker, McClain, and Hoover returned to the residence in time to see Marks driving off in a different vehicle. Hoover exited the vehicle, and Baker and McClain raced after Marks in the Honda.

As Baker traveled eastbound on Main Street, he crossed the center line and nearly veered into the path of an oncoming vehicle. He over-corrected to avoid a collision and

lost control of the Honda. The Honda swung to the right, skidded sideways, and entered a yard adjacent to the street. The passenger side of the Honda slammed into a tree.

Medical emergency personnel found Baker semi-conscious and leaning against a non-responsive McClain.¹ Neither man was wearing a seatbelt. During the collision, McClain's head struck the tree, and he sustained a shattered skull. Both men were rushed to Methodist Hospital, where blood test results indicated that Baker's blood alcohol content ("BAC") was 0.144 grams of alcohol per one hundred milliliters of blood. Crash experts later determined that at the time of the crash, Baker was driving approximately sixty-one miles per hour in a thirty miles per hour zone.

On May 18, 2005, the State charged Baker with Count I: Causing death while operating a motor vehicle with a BAC of 0.08 or more, as a class C felony; Count II: Causing death while operating a motor vehicle while intoxicated, as a class C felony; Count III: Operating a motor vehicle while intoxicated, endangering a person, as a class A misdemeanor; Count IV: Operating a motor vehicle with a BAC of 0.08 or more, as a class C misdemeanor; and Count V: Operating a motor vehicle while intoxicated, as a class C misdemeanor. Baker was arrested on May 25, 2005, after his release from the hospital.

Under the terms of a written plea agreement, Baker agreed to plead guilty to Count I, causing death while operating a motor vehicle with BAC of 0.08 or more, as a class C felony. In exchange, the State agreed to dismiss the remaining counts. Baker and the

¹ Baker maintains that he has no recollection of the crash. At the sentencing hearing, he testified that the last thing that he can remember before waking at the hospital was his trip to White Castle.

State tendered the written plea agreement to the trial court on October 5, 2006. The plea agreement provided, in pertinent part:

8. I understand that:

...

c. A person convicted of a class “C” felony shall be imprisoned for a fixed term between two (2) and eight (8) years, the [presumptive] sentence is four (4) years; in addition, a fine of not more than \$10,000 may be imposed.

* * *

11. I understand that I may plead NOT GUILTY to any offense charged against me, and that the United States and Indiana Constitutions guarantee me:

* * *

j. The right to have a jury (or judge in a bench trial) determine beyond a reasonable doubt the existence of any aggravating circumstances that may increase the length of my sentence beyond the presumptive sentence for the crimes to which I am pleading.

I understand that by pleading GUILTY I am voluntarily waiving these rights.

12. I declare that I offer my plea of GUILTY freely and voluntarily. I do not do so because of any threats or promises made to me from anyone, other than those contained in this agreement.

(Baker’s App. 79-81) (emphasis in original). Baker pleaded guilty pursuant to the terms of the plea agreement and the trial court accepted Baker’s open plea.² The trial court conducted the sentencing hearing on December 11, 2006. Several witnesses, including Baker, provided testimony. The defense argued that there were no aggravating circumstances and advanced Baker’s acceptance of responsibility and his expression of remorse as mitigating circumstances. Before imposing sentence, the trial court stated,

² A plea agreement where the issue of sentencing is left to the trial court’s discretion is often referred to as an “open plea.” *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004).

In this particular circumstance your factual background doesn't justify a maximum sentence [from] an executed standpoint, nor shall I provide one.

* * *

The consequences of your actions certainly must be recognized. You have expressed remorse. You have attempted to work, to take care of your dependants [sic]. You have support. All that is benefit to you [sic]. Equally, I must say however that one of the things that often occurs and is most apt to occur in a sentencing such as this, is for us to consider other issues. And those issues are larger than you. One of those issues is deterrents [sic]. It is extraordinary [sic] important to the Court's sentence not only to deter you from future conduct, but [to] deter others equally situated. Those other children . . . that may be . . . having to make a determination as to whether or not after consumption of alcohol, drugs or otherwise, [they are] going to get into a car and . . . drive.

Certainly, [a]s recognized by [McClain]'s family, he made a mistake and he has paid dearly for that mistake. Ultimately, he has to pay the consequences . . . of choosing that particular path, to get into the car with somebody that had been drinking and if, if nothing else out of something so terrible, . . . we can teach others from it. Then that . . . becomes as good as we can achieve. It's something positive out of something so terribly bad. In your circumstance, you will pay the consequences as well, because that deterrent aspect to others, is just as well a deterrent aspect to you. If other individuals are kept from operating a motor vehicle, under the circumstances you found yourself in [], then that is the best that we can perhaps achieve under the sentencing scheme that we have available to us. I will join in the prosecutor's position that you have an opportunity for modification. * * * You can file it anytime you wish under the plea . . .

(Tr. 49-50). The trial court then imposed a seven-year sentence, ordering Baker to serve five years in the Department of Correction, and suspending the remaining two years to probation. Baker now appeals from his sentence.

Additional facts will be provided below.

DECISION

Baker first argues that the trial court erred because it imposed a sentence in excess of the maximum sentence allowable under *Blakely*. Next, he argues that his guilty plea

was not knowingly, intelligently and voluntarily tendered to the trial court³ because the written plea agreement and the sentencing discussion indicate “lingering conflict and confusion.” Baker’s Br. 23. Finally, Baker argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Before we address Baker’s contentions, we note our standard of review. In general, sentencing decisions lie within the sound discretion of the trial court. *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002). Accordingly, we review sentencing decisions only for an abuse of discretion. *Id.* “An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Trujillo v. State*, 806 N.E.2d 317, 323 (Ind. 2004).

We also note that the underlying events occurred before April 25, 2005,⁴ when the Indiana General Assembly implemented a new advisory sentence scheme. Thus, the

³ Defendants who plead guilty may challenge their sentences on direct appeal. *Jackson v. State*, 853 N.E.2d 138, 139 (Ind. Ct. App. 2006). Baker argues on direct appeal that his guilty plea was not knowingly, intelligently or voluntarily entered; however, direct appeal is not the proper vehicle for pursuing this claim. It is well-settled that “[a] conviction based upon a guilty plea may not be challenged by motion to correct errors and direct appeal.” *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996) (citing *Crain v. State*, 261 Ind. 272, 301 N.E.2d 751 (1973)). In *Crain*, the rationale for this rule was explained as follows:

[T]he type and extent of evidentiary hearing afforded at a post-conviction proceeding is much broader than a hearing on a motion to correct errors and specifically designed to allow appellant an opportunity to establish the factual assertions he makes concerning his guilty plea.

Id. at 273, 301 N.E.2d at 751-52. Thus, because we cannot resolve Baker’s claim without additional evidence, we do not reach this claim on direct appeal.

⁴ Effective April 25, 2005, Indiana’s sentencing scheme was amended to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Baker committed his crime before this statute took effect but was sentenced after the effective date.

previous sentencing scheme – which established a presumptive sentence and a range for each class of felony and misdemeanor – is applicable here. *Gutermuth v. State*, 868 N.E.2d 427, 431 (Ind. 2007). Under the presumptive sentencing scheme, a sentence could be enhanced or reduced from the presumptive sentence based on aggravating or mitigating circumstances found by the trial judge. *Id.*

1. *Blakely*

Baker first argues that the trial court sentenced him in violation of *Blakely*. Specifically, he contends that his seven-year sentence exceeds the four-year maximum sentence allowable under *Blakely*. Under *Blakely*, a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Blakely* sentencing rights and consented to judicial factfinding. *Blakely*, 542 U.S. at 310.

Baker’s written plea agreement indicates that he consented to judicial factfinding, a means of determining aggravating factors that does not violate *Blakely*. The plea agreement provides,

There is a split on this court as to whether the advisory or presumptive sentencing scheme applies under such circumstances. Compare *Walsman v. State*, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date). The presumptive sentencing scheme was in effect at the time of Baker’s offense; therefore, we refer herein to Baker’s “presumptive” sentence.

I understand that I may plead NOT GUILTY to any offense charged against me, and that the United States and Indiana Constitutions guarantee me: . . .

The right to have a jury (or judge in a bench trial) determine beyond a reasonable doubt the existence of any aggravating circumstances that may increase the length of my sentence beyond the presumptive sentence for the crimes to which I am pleading.

I understand that by pleading GUILTY I am voluntarily waiving these rights.

(Baker’s App. 80) (emphasis in original). Baker expressly waived his right to have the existence of aggravating factors found by a jury; therefore, we find that he has no *Blakely* claim.

2. Appropriateness

Finally, we address Baker’s inappropriateness claim. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute “if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” The defendant must persuade the appellate court that his sentence meets the inappropriateness standard of review. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Baker pleaded guilty to causing death when operating a motor vehicle with a BAC of 0.08 or more, a class C felony. At the time, the presumptive sentence for a class C felony was four years; no more than four years could be added for aggravating circumstances, and no more than two years could be subtracted for mitigating circumstances. Ind. Code § 35-50-2-6(a) (1992). Here, the trial court identified Baker’s expression of remorse and acceptance of responsibility as mitigating circumstances; and,

deterrence and the impact of McClain's death on his family as aggravating factors to support the enhanced seven-year sentence.

Baker argues on appeal that the trial court failed to consider several other mitigating factors. We rely upon *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006), for the following proposition: if a defendant "fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal."

At the sentencing hearing, Baker advanced only two mitigating circumstances – his acceptance of responsibility and his expression of remorse. The trial court expressly considered both of the proffered factors, and acknowledged that they were mitigating circumstances, as well as the fact that Baker was employed, supporting his dependents, and had a support system. Baker now challenges the trial court's failure to consider his youth, his limited criminal history, his pending military enlistment, and the likelihood that he would respond affirmatively to probation or short-term imprisonment. Inasmuch as Baker failed to advance these alleged mitigating circumstances at sentencing, those claims are precluded from our review.

Baker also argues that the trial court relied upon improper aggravating circumstances in imposing its sentence. Specifically, he argues that the trial court improperly enhanced his sentence based upon the impact of McClain's death on his family and the potential to deter others from driving under the influence. In its brief, the State appears to concede the weakness of these aggravating circumstances for purposes of

enhancing a defendant's sentence, noting, "[both are] perhaps improper to support the imposition of an increased sentence" State's Br. 8 (emphasis added). We agree.

The State cites *Hart v. State*, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) for the premise that "[v]ictim impact is an aggravating circumstance only if it is demonstrated that the crime had destructive impact not normally associated with the offense." Baker caused McClain's death while he was operating a motor vehicle with a BAC of .08 or more. At the sentencing hearing, the trial court heard testimony from McClain's mother, step-father, and sister about their immense grief at McClain's death. "Generally, the impact that a victim or a family experiences as a result of a particular offense is accounted for in the presumptive sentence." *Simmons v. State*, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001). As such, because the State presented no evidence of a destructive impact beyond the grief normally associated with the offense, we find that the trial court's reliance upon this factor was improper as a matter of law.

Likewise, with regard to the deterrence factor, the trial court discussed at length the potential to discourage other individuals from driving under the influence, stating,

It is extraordinary [sic] important to the Court's sentence not only to deter you from future conduct, but [also] to deter others equally situated. Those other children if you will, that may be sitting at White Castle, having to make a determination as to whether or not after consumption of alcohol, drugs or otherwise, [they are] going to get into a car . . . to drive. Certainly, [this] is recognized by [McClain]'s family, he made a mistake and he has paid dearly for that mistake. Ultimately, he has to pay the consequences . . . of choosing . . . to get into the car with somebody that had been drinking and of, if nothing else out of something so terrible, if we can teach others from it[,] [t]hen that in and of itself becomes as good as we can achieve. It's something positive out of something so terribly bad. In your circumstance, you will pay the consequences as well, because that deterrent aspect to others, is just as well a deterrent aspect to

you. If other individuals are kept from operating a motor vehicle, then that is the best that we can perhaps achieve under the sentencing scheme that we have available to us.

(Tr. 49-50). We recognize the public policy aims of the trial court's impassioned statement; however, a trial judge's desire to send a personal, philosophical, or political message is an improper reason to aggravate a sentence. *Nybo v. State*, 799 N.E.2d 1146, 1152 (Ind. Ct. App. 2003). The trial court erred when it relied upon deterrence as a basis for enhancing Baker's sentence.

An enhanced sentence may not be imposed absent a valid aggravating circumstance. *Farmer v. State*, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002). Given the trial court's reliance upon two improper aggravating circumstances, we remand for resentencing in order for the trial court to (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is deemed mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006) (identifying the analysis that a trial court must employ when it uses aggravating and mitigation circumstances to enhance or reduce the presumptive sentence).

Remanded for re-sentencing consistent with our opinion.

MAY, J., and CRONE, J., concur.